

SENATE BILL NO. 94

INTRODUCED BY CROMLEY

BY REQUEST OF THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING PROCEDURES FOR SERVICE OF PROCESS IN CHILD ABUSE AND NEGLECT ACTIONS; AND AMENDING SECTIONS 41-3-422, 41-3-428, AND 41-3-429, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 41-3-422, MCA, is amended to read:

"41-3-422. Abuse and neglect petitions -- burden of proof. (1) (a) Proceedings under this chapter must be initiated by the filing of a petition. A petition may request the following relief:

- (i) immediate protection and emergency protective services, as provided in 41-3-427;
- (ii) temporary investigative authority, as provided in 41-3-433;
- (iii) temporary legal custody, as provided in 41-3-442;
- (iv) long-term custody, as provided in 41-3-445;
- (v) termination of the parent-child legal relationship, as provided in 41-3-607;
- (vi) appointment of a guardian pursuant to 41-3-444;
- (vii) a determination that preservation or reunification services need not be provided; or
- (viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that may be required for the best interests of the child.

(b) The petition may be modified for different relief at any time within the discretion of the court.

(c) A petition for temporary legal custody may be the initial petition filed in a case.

(d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that preservation or reunification services need not be provided is made in the petition.

(2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be accompanied by:

- (a) an affidavit by the department alleging that the child appears to have been abused or neglected and

1 stating the basis for the petition; and

2 (b) a separate notice to the court stating any statutory time deadline for a hearing.

3 (3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.

4 (4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The
5 Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter.
6 Proceedings under a petition are not a bar to criminal prosecution.

7 (5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the
8 burden of presenting evidence required to justify the relief requested and establishing:

9 (i) probable cause for the issuance of an order for immediate protection and emergency protective
10 services or an order for temporary investigative authority;

11 (ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;

12 (iii) a preponderance of the evidence for an order of long-term custody; or

13 (iv) clear and convincing evidence for an order terminating the parent-child legal relationship.

14 (b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child
15 Welfare Act, 25 U.S.C. 1901, et seq., the standards of proof required for legal relief under the federal Indian
16 Child Welfare Act apply.

17 (6) (a) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent,
18 guardian, or other person or agency having legal custody of the child named in the petition, if residing in the
19 state, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal
20 relationship at least 5 days before the date set for hearing. If the person or agency cannot be served personally,
21 the person or agency may be served by publication as provided in 41-3-428 and 41-3-429.

22 (b) Copies of all other petitions ~~must may~~ **MUST** be served upon the person, the agency, or the person's
23 attorney of record by certified mail, by personal service, or by publication as provided in 41-3-428 and 41-3-429.
24 If service is by certified mail, the department must receive a return receipt signed by the person to whom the
25 notice was mailed for the service to be effective. Service of the notice is considered to be effective if, in the
26 absence of a return receipt, the person to whom the notice was mailed appears at the hearing.

27 (7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency
28 having legal custody, the court shall appoint an attorney to represent the unavailable party when, in the opinion
29 of the court, the interests of justice require.

30 (8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian,

1 and if there is no guardian, the court shall appoint one.

2 (9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent,
3 preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition
4 of all judicial hearings for the child and must be given an opportunity to be heard. The right to appear or to be
5 heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring
6 for the child must be given notice of all reviews by the reviewing body.

7 (b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child
8 who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section
9 may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented
10 on those subjects provided for in 41-3-437(4), determines that the intervention of the person is in the best
11 interests of the child. A person granted intervention pursuant to this subsection is entitled to participate in the
12 adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held
13 pursuant to this chapter involving the custody of the child.

14 (10) An abuse and neglect petition must:

15 (a) state the nature of the alleged abuse or neglect and of the relief requested;

16 (b) state the full name, age, and address of the child and the name and address of the child's parents
17 or guardian or person having legal custody of the child;

18 (c) state the names, addresses, and relationship to the child of all persons who are necessary parties
19 to the action.

20 (11) The court may at any time on its own motion or the motion of any party appoint counsel for any
21 indigent party. If an indigent parent is not already represented by counsel, counsel must be appointed for an
22 indigent parent at the time that a request is made for a determination that preservation or reunification services
23 need not be provided.

24 (12) At any stage of the proceedings considered appropriate by the court, the court may order an
25 alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute
26 resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family
27 group decisionmaking meeting, mediation, or a settlement conference. If a court orders an alternative dispute
28 resolution proceeding, a party who does not wish to participate may file a motion objecting to the order. If the
29 department is a party to the original proceeding, a representative of the department who has complete authority
30 to settle the issue or issues in the original proceeding must be present at any alternative dispute resolution

1 proceeding.

2 (13) Service of a petition under this section must be accompanied by a written notice advising the child's
3 parent, guardian, or other person having physical or legal custody of the child of the:

4 (a) right to request the appointment of counsel if the person is indigent or if appointment of counsel is
5 required under the federal Indian Child Welfare Act, if applicable;

6 (b) right to contest the allegations in the petition; and

7 (c) timelines for hearings and determinations required under this chapter.

8 (14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's
9 parent, guardian, or other person having physical or legal custody of the child that:

10 (a) the court is required by federal and state laws to hold a permanency hearing to determine the
11 permanent placement of a child no later than 12 months after a judge determines that the child has been abused
12 or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

13 (b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination
14 of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental
15 rights; and

16 (c) completion of a treatment plan does not guarantee the return of a child.

17 (15) A court may appoint a standing master to conduct hearings and propose decisions and orders to
18 the court for court consideration and action. A standing master may not conduct a proceeding to terminate
19 parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable
20 in the area of child abuse and neglect laws."

21
22 **Section 2.** Section 41-3-428, MCA, is amended to read:

23 **"41-3-428. Service of process -- service by publication -- effect.** (1) Except as otherwise provided
24 in ~~subsection (2) this chapter~~, service of process ~~under this chapter~~ must be made as provided in the Montana
25 Rules of Civil Procedure.

26 (2) If a person cannot be served personally OR BY CERTIFIED MAIL, the person may be served by
27 publication as provided in 41-3-429. Publication constitutes conclusive evidence of service, and a hearing must
28 then proceed at the time and date set, with or without the appearance of the person served by publication. At
29 or after the hearing, the court may issue an order that will adjudicate the interests of the person served by
30 publication.

(3) If a parent cannot be identified or found prior to the initial hearings allowed by part 4, the court may grant the following relief, pending service by publication on the parent who cannot be identified or found and based upon service of process on only the parent, guardian, or other person having legal custody of the child:

- (a) immediate protection;
- (b) temporary investigative authority; and
- (c) temporary legal custody."

Section 3. Section 41-3-429, MCA, is amended to read:

"41-3-429. Service by publication -- summons -- form. (1) Before service by publication is authorized in a proceeding under this chapter, the department shall file with the court an affidavit stating that, after due diligence, the person cannot be identified or found and stating the diligent efforts made to identify, locate, and serve the person. The affidavit is sufficient evidence of the diligence of any inquiry made by the department. The affidavit may be combined with any other affidavit filed by the department. Upon complying with this subsection, the department may obtain an order for the service to be made upon the party by publication. The order may be issued by either the judge or the clerk of the court.

(2) Service by publication must be made by publishing notice three times, once each week for 3 successive weeks:

(a) in a newspaper in a community in which the publication can reasonably be calculated to be seen by the person, based upon the last-known address or whereabouts, if known, of the person; ~~whether inside or outside this state~~ if in the state of Montana; or

(b) if no last-known address exists, if the last-known address is outside Montana, or if the identity or location of the person is unknown, in a newspaper in the county in which the action is pending, if a newspaper is published in the county, and, if a newspaper is not published in the county, in a newspaper published in an adjoining county and having a general circulation in the county.

(3) Service by publication is complete on the date of the last publication required by subsection (2).

(4) A summons required under this chapter must:

(a) be directed to the parent, legal guardian, other person having legal custody of the child, or any other person who is required to be served; and

(b) be signed by the clerk of court, be under the seal of the court, and contain:

(i) the name of the court and the cause number;

1 (ii) the initials of the child who is the subject of the proceedings;
2 (iii) the name of the child's parents, if known;
3 (iv) the time within which an interested person shall appear;
4 (v) the department's address;
5 (vi) a statement in general terms of the nature of the proceedings, including the date and place of birth
6 of the child, the date and place of the hearing, and the phone number of the clerk of the court in which the
7 hearing is scheduled; and
8 (vii) notification apprising the person served by publication that failure to appear at the hearing will
9 constitute a denial of interest in the child, which denial may result, without further notice of this proceeding or
10 any subsequent proceeding, in judgment by default being entered for the relief requested in the petition."

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